

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY CURRY,

Defendant-Appellant.

UNPUBLISHED

June 21, 1996

No. 184159

LC No. 94-003577

Before: Cavanagh, P.J. and Hood and J. J. McDonald*, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of second-degree murder, MCL 750.317; MSA 28.549, and was sentenced to twenty to forty years imprisonment. He appeals as of right and we affirm.

Defendant first argues that this Court's opinion in *People v Pardon*, unpublished memorandum opinion of the Court of Appeals, issued June 9, 1995 (Docket No. 180675), is collaterally estops the prosecution with respect to the issue of whether the district court abused its discretion in binding over defendant's co-defendant, Catherine Pardon on the charge of felony-murder. We disagree.

Collateral estoppel bars relitigation of issues in a subsequent or different action between the same parties as those in the initial action, where the previous proceeding "culminated in a valid, final judgment and the issue was (1) actually litigated, and (2) necessarily determined. *People v Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990). To be considered necessary to the determination, the issue must have been essential to the resulting judgment. Collateral estoppel only applies where the basis of the prior judgment can be clearly, definitely and unequivocally ascertained. *Id.* This doctrine is a flexible rule intended to conserve judicial resources, eliminate multiple litigation, and encourage reliance on adjudication. *Detroit v Qualls*, 434 Mich 340, 357 n 30, 454 NW2d 374 (1990).

In the *Pardon* case, the holding rested primarily on the lack of evidence of malice with respect to Pardon's role as defendant's accomplice in Holman's murder. In the present case however, the

* Circuit judge, sitting on the Court of Appeals by assignment.

evidence of defendant striking Holman over the head with the pipe sufficiently established the element of malice. The issue of whether there was sufficient evidence of an intention to commit a larceny was not a necessary component of the holding in the *Pardon* case. Therefore, we find that the doctrine of collateral estoppel is inapplicable. Furthermore, with respect to the substance of defendant's challenge of the bindover, the fact that there was sufficient evidence presented at trial to support the charge of felony-murder, renders any abuse of discretion by the magistrate in the bindover harmless error. *People v Meadows*, 175 Mich App 355, 359; 437 NW2d 405 (1989).

Defendant next asserts that the trial court erred in denying his motion for directed verdict on the charge of felony-murder. We disagree.

When reviewing a trial court's denial of a motion for directed verdict, this Court views the evidence presented in a light most favorable to the prosecution to determine whether there was sufficient evidence to permit a rational trier of fact to find the essential elements of the crime charged beyond a reasonable doubt. *People v Partridge*, 211 Mich App 239, 240; 535 NW2d 251 (1995). The elements of felony-murder are (1) an act resulting in the killing of a human being, (2) done with the intent to cause death, great bodily harm, or to create a very high risk that death or great bodily harm with the knowledge that death or such harm was likely to result, (3) while in the act of committing, attempting to commit, or assisting in the commission of any of the felonies enumerated in MCL 750.316; MSA 28.548. *People v Turner*, 213 Mich App 558, 566 (1995). One of the enumerated felonies is larceny. MCL 750.316(1)(b); MSA 28.548(1)(b).

In the present case, taking the evidence most favorably, Holman was killed in an attic closet by defendant who then hid the body for approximately a month before it was discovered. Either prior to or after the murder, defendant stole Holman's automobile and money. From this evidence it could reasonably be inferred that the killing was part of a plan which included the theft of Holman's car and money by defendant. As such, we conclude that the trial court did not err in denying defendant's motion for directed verdict on the charge of felony-murder.

Finally, defendant asserts that in his closing argument, the prosecutor's remarks improperly shifted the burden of proof on the charge of manslaughter and self-defense to defendant. Appellate review of allegedly improper remarks made by the prosecution is precluded if the defendant fails to make a timely and specific objection to the comments, unless failure to review the issue would result in manifest injustice or if no curative instruction could have eliminated the prejudicial effect. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Gonzalez*, 178 Mich App 526, 534-535; 444 NW2d 228 (1989). Defendant failed to object to the prosecutor's closing argument with respect to the issues raised on appeal. The argument defendant complains of was properly focused on the evidence adduced at trial and on the prosecution's theory of the case. There being nothing improper in the prosecutor's remarks, we find defendant's assertion's in this regard completely without merit.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Harold Hood

/s/ John J. McDonald